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Position: FAV

February 13, 2020

**Testimony on SB 535 –
Public Information Act - Denial of Part of a Public Record - Victims and Witnesses
Education, Health, and Environmental Affairs**

Position: Favorable

Common Cause Maryland supports SB 535, which would protect specific individuals while preserving the public's right of access to 9-1-1 communications.

The Public Information Act (PIA) is an essential tool for public oversight of our state, county, and local governments. It allows Marylanders greater transparency into the workings of our officials, gives us access to data collected with public dollars, helps ensure a level of transparency vital to a healthy democracy.

The foundation of the PIA is the presumption of disclosure. Unless a disclosure is explicitly disallowed by law, a custodian of public information must disclose that information to any person who requests it. This premise limits the government's ability to shield valid public information from disclosure. In order for the PIA to be an effective check on the government, it is crucial that this presumption is protected by ensuring that exemptions are narrowly tailored and serve a clear public interest.

SB 535 meets that criteria by protecting by ensuring that discretionary denials under the PIA can be applied in situations where a custodian reasonably believes that inspection of a part of a public record would reveal the identity of a victim or a witness. Also that custodians provide notification before granting inspection of a 9-1-1 communications record that depicts a witness and that relevant portions can be redacted to avoid denying the release of the entire record. The exemption is limited only to that information in those circumstances and would serve the public interest by giving Marylanders confidence that we actively work to protect those most at risk.

SB 535 would expand on a limited disclosure exemption that is in the best interest of the public. We respectfully ask the committee for a favorable report.

MACo_AlexButler_FAV_SB535

Uploaded by: Butler, Alex

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Senate Bill 535

Public Information Act - Denial of Part of a Public Record - Victims and Witnesses

MACo Position: **SUPPORT**

To: Education, Health, and Environmental Affairs

Date: February 13, 2020

From: Alex Butler

The Maryland Association of Counties (MACo) **SUPPORTS** SB 535 as the bill provides reasonable protections against the release of certain personally identifying information relating to witnesses under the Maryland Public Information Act (PIA) for 9-1-1 communication records.

SB 535 would redefine the definition of “Contrary to the public interest” as it applies to discretionary denials under PIA to include situations where custodians reasonably believe that disclosing the requested record would reveal the identity of a witness. Under the bill, “witness” means a witness of specified crimes that include child abuse, homicide, and certain sexual crimes. Current law already provides that custodians have the authority to deny records that would expose a victim, and this bill would extend that reasonable protection to witnesses.

SB 535 is narrowly crafted to protect sensitive information of witnesses to serious, specified crimes, serving to protect these individuals from potential harm that could result from having their identity made public. Accordingly, MACo asks the Committee to issue a **FAVORABLE** report on SB 535.

AG_Kemerer_FAV_SB535

Uploaded by: KEMERER, HANNIBAL

Position: FAV

BRIAN E. FROSH
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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.
410-576-6584

February 13, 2020

To: The Honorable Paul G. Pinsky
Chair, Education, Health, and Environmental Affairs Committee

From: Hannibal G. Williams II Kemerer, Legislative Director, Office of the Attorney General

Re: SB 535 Public Information Act – Denial of Part of a Public Record – Victims and Witnesses (**Support**)

Senate Bill 535 proposes to modernize current law to reflect technological advancements, which includes photos and video in addition to phone calls. The Attorney General's Office supports this legislative effort to codify an update to our 1986 Opinion in Mr. John G. Rouse, III, 71 Md. Op. Atty. Gen. (1986) (enclosed). We believe that this legislation is timely and will serve to promote the public interest.

For all of the foregoing reasons, the Office of Attorney General urges a favorable report on SB 535.

cc: Members of the Education, Health, and Environmental Affairs Committee



71 Md. Op. Atty. Gen. 288 (Md.A.G.), 1986 WL 287625

Office of the Attorney General

State of Maryland
Opinion No. 86-025
April 4, 1986

**PUBLIC INFORMATION—911 SYSTEM—RECORDINGS OF 911 CALLS ARE ‘PUBLIC RECORDS’
GENERALLY SUBJECT TO DISCLOSURE, BUT PORTIONS OF THE RECORDINGS ARE WITHIN CERTAIN
EXCEPTIONS TO DISCLOSURE.**

Cite as: 71 Opinions of the Attorney General — (1986) [Opinion No. 86-025 (April 4, 1986)]

*1 Mr. John G. Rouse, III
Chairman
Emergency Number Systems Board
6776 Reisterstown Road
Baltimore, Maryland 21215

Dear Mr. Rouse:

You have requested our opinion on whether tape recordings of calls to 911 Emergency Telephone System centers are subject to the disclosure requirements of the Maryland Public Information Act (the ‘PIA’) and, if so, whether there are any circumstances under which disclosure may or must be denied.

For the reasons stated below, we conclude that:

1. Recordings of calls to 911 Emergency Telephone System centers are ‘public records’ under the PIA.
2. The portion of any recording that contains medical or psychological information about an individual may not be disclosed.¹
3. Recordings of calls for police assistance may be withheld from disclosure, but only if disclosure would be contrary to the public interest.
4. All other recordings must be disclosed upon request, except in the extraordinary situation in which a court is asked to withhold otherwise available information.²

I

911 Emergency Telephone System

The 911 Emergency Telephone System was established in Maryland by Chapter 730 of the Laws of Maryland of 1979. That statute, now codified at Article 41, §§ 204H-1 through 204H-8 of the Maryland Code, was enacted in response to the General Assembly's finding of a need ‘to eliminate delays [in citizens' summoning appropriate emergency aid] caused by lack of familiarity with emergency numbers and by understandable confusion in circumstances of crisis.’ Article 41, § 204H-1(d).³ To that end, the General Assembly established the number 911 as ‘the primary emergency telephone number for the State of Maryland.’ Article 41, § 204H-1(e).

As of July 1, 1985, a 911 system was in operation in Baltimore City and in each of Maryland's counties. Maryland thus became the second state to have a 911 system in effect statewide.⁴

The 911 system in each jurisdiction provides citizens with easy emergency access to police, fire fighting, and emergency ambulance services. When the 911 number is dialed, the caller automatically reaches a public safety answering point operated around the clock in the county where the call is made. Personnel at that answering point determine the nature of the emergency and route the call to the appropriate agency for response or directly dispatch the needed assistance.

The county systems are overseen by the Emergency Number Systems Board, which must approve all local plans for the installation or expansion of 911 systems and review and coordinate their operation. The minimum requirements for 911 systems established by the Board include electronic recording, with playback capability, of all incoming calls. COMAR 12.11.03.05E and F.⁵ The tapes themselves are physically maintained in the local 911 emergency communication centers.

II

Public Information Act Disclosure Requirements

*2 The PIA, codified at §§ 10-611 through 10-628 of the State Government Article ('SG' Article), is designed to afford the public a general right of 'access to information about the affairs of government and the official acts of public officials and employees.' SG § 10-612(a). To that end, the PIA requires that, '[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.' SG § 10-613(a).⁶

A 'public record' is any documentary material—expressly including a tape recording—that 'is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business.' SG § 10-611(f). Thus, the PIA applies to all the records of every agency that carries out governmental functions, whether on the State or local level. See *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26 (1983).

In light of the PIA's broad scope, there is no question that the 911 emergency centers operated by the counties are governmental agencies subject to the PIA and that the tape recordings of telephone calls to those centers are public records within the meaning of the PIA. Thus, unless the recordings are specifically exempted from the PIA's disclosure requirements, they must be made available to anyone who requests them. *Superintendent, Maryland State Police v. Henschen*, 279 Md. 468 (1977). See also 61 *Opinions of the Attorney General* 702, 705 (1976) (clerk of court may not deny access to marriage records, regardless of their intended use by person seeking inspection).

III

Exceptions to Disclosure

A. Introduction

Despite the PIA's general purpose to permit broad public access to public records, the Act contains a number of provisions that require or permit a custodian to deny requests for inspection of records. Those exceptions should, as a general matter, be construed narrowly, to promote public access to information about governmental activities.

At the same time, the PIA recognizes that the public's right to information is counterbalanced by the right to privacy of individuals who are subjects of governmental records. SG § 10-612(b) accordingly provides that, 'unless an unwarranted invasion of the privacy of a person in interest would result, [the PIA] shall be construed in favor of permitting inspection of a public record.'⁷ Particular calls for emergency assistance might well reveal intimate personal information about the caller

or others. In those circumstances, we think that releasing the record to anyone other than the person in interest would be 'an unwarranted invasion of [that person's] privacy.' Consequently, when the applicant seeking disclosure of such a call is not the person in interest, the PIA's exceptions can and should be construed somewhat more liberally than would otherwise be the case.

B. Privileged or Confidential Records

*3 Public records must be withheld from disclosure to the extent that (i) the information they contain is made 'privileged or confidential' by law or (ii) inspection of a particular record would be contrary to State or federal law, the rules adopted by the Court of Appeals, or a court order. SG § 10-615. However, none of those exceptions applies to the recordings of calls made to 911 centers. While callers might prefer that their calls be kept confidential, the requirement that 'privileged or confidential' records be withheld from public inspection, by its terms, applies only to records protected by common-law or statutory privileges, such as the attorney-client or psychiatrist-patient privilege, or by other confidentiality requirements. See, e.g., 66 Opinions of the Attorney General 98, 103 (1981); 64 Opinions of the Attorney General 236, 239 (1979). Nor does any federal or State law or court rule generally prevent inspection of calls to 911 centers. Cf. 7 U.S.C. § 2020(e) (limiting disclosure of information concerning food stamp recipients).⁸

C. Other Personal Records

The PIA itself requires that certain enumerated records not otherwise made confidential be withheld from public inspection. SG § 10-616. However, records of calls for emergency assistance are not included in that list of protected records. Records of calls to 911 centers are therefore not automatically and wholly exempt from disclosure under that section.

D. Personal Information

1. Medical and psychological information

The PIA requires that certain specific types of information be withheld from public disclosure. SG § 10-617(b) requires a custodian to 'deny inspection of the part of a public record that contains medical or psychological information about an individual.' In our view, statements concerning an injured or ill person's symptoms or condition, provided to a 911 center operator for the purpose of obtaining appropriate emergency medical care, are 'medical or psychological information' that must be withheld.

The inclusion of such information in a public record does not preclude public access to the entire record, however—it is only the part that contains the protected information that must be withheld. Therefore, if access to a tape is requested, the tape must be reviewed to determine whether portions of it contain information that must be deleted before the tape's release.⁹

2. Sociological information

SG § 10-617(c) requires that 'sociological information' be withheld, if—but only if—'the official custodian has adopted rules or regulations that define sociological information for purposes of this subsection.' Although the PIA does not provide further guidance, the apparent intent is to permit the protection of the kind of personal information that a person would disclose only under the conditions of confidentiality that customarily attend sociological studies. Thus, for example, the Department of Public Safety and Correctional Services has defined 'sociological data,' with respect to parole and probation authorities, as including '[p]ersonal relationships, beliefs, values, etc.,' and '[r]eligious preference and attendance.' COMAR 12.11.02.02M(2)(a) and (g). The Emergency Number Systems Board might wish to consider the preparation of a model regulation along these lines.

E. Discretionary Nondisclosure

*4 In addition to requiring that certain records or information be withheld from public inspection, the PIA also grants custodians discretion to deny inspection of particular parts of specified records if inspection by the applicant 'would be contrary to the public interest.' SG § 10-618(a). That section, like SG § 10-616, applies only to the records specifically there designated. Those include 'records of investigations conducted by . . . a State's attorney, . . . a police department, or a sheriff' and 'an investigatory file compiled for any other law enforcement . . . purpose.' SG § 10-618(f)(1)(i) and (ii). In our view, recordings of calls to 911 centers for police assistance generally are not 'records of an investigation conducted by' a law enforcement agency, but they are part of 'an investigatory file compiled for any other law enforcement . . . purpose.'

1. Records of investigations

In 63 Opinions of the Attorney General 543, 547 (1978), this office concluded that arrest logs are not 'records of investigations' because they 'merely reflect the end result of a police investigation. They contain no information whatever concerning the actual investigation.' At the same time, the Attorney General noted that 'should such records contain such investigatory material, they may very well be subject to the [SG § 10-618(f)(1)(i)] exception.' Id. The same is true, in our opinion, of records of calls to 911 centers for police assistance.

A call to a 911 center does not directly convey any information to law enforcement officials. The centers are not themselves part of any of the agencies enumerated in SG § 10-618(f)(1)(i), and the 911 operator who takes a call simply dispatches needed police assistance to the location indicated. Only on rare occasions do law enforcement officials review the recording of such a call as part of an investigation. Thus, like arrest logs, records of calls to 911 centers ordinarily 'contain no information whatever concerning the actual investigation' conducted by a law enforcement agency. Should the record of a call actually be used in an investigation, however, it would be a record of the investigation.

2. Investigatory files

However, we think that records of calls for police assistance are part of 'an investigatory file compiled for any other law enforcement . . . purpose,' within the meaning of SG § 10-618(f)(1)(ii). Those calls trigger an investigation, at least to the extent of a police response to ascertain whether further law enforcement action is needed. In our view, the recorded complaint that triggers such an investigation is part of an 'investigatory file.' And the records of calls to 911 centers are compiled for the law enforcement purpose of ensuring that police assistance is promptly dispatched in an emergency.

Federal courts construing the analogous exception in the Freedom of Information Act (the 'FOIA') have held that letters triggering agency investigations are covered by that exception.¹⁰ E.g., Evans v. Department of Transportation, 446 F.2d 821, 824 (5th Cir. 1971) (letter inquiring how to bring pilot's abnormal behavior to attention of proper authorities was part of investigatory file); Luzach v. United States, 435 F. Supp. 31, 34, aff'd per curiam, 564 F.2d 101 (8th Cir. 1977) (unsolicited anonymous tip advising Internal Revenue Service to audit taxpayer was investigatory record).

*5 The Court of Appeals has held that FOIA decisions are persuasive as to the interpretation of the PIA. Faulk v. State's Attorney, 299 Md. 493, 506 (1984). Hence, Maryland courts would, we think, likewise conclude that the records of complaints that trigger investigations constitute 'an investigatory file,' whether they are embodied in tape recordings or written communications.

However, the conclusion that 911 calls for police assistance are an 'investigatory file compiled for [a] law enforcement purpose' does not by itself mean that the recordings may be withheld. First, if the applicant is a person in interest, nondisclosure is authorized only to the extent that disclosure would cause one of the harms specified in SG § 10-618(f)(2). See generally 64 Opinions of the Attorney General 236, 241-43 (1979) (discussing grounds for nondisclosure of investigatory records). Moreover, any other person is entitled to access unless the custodian has reason to conclude that inspection of the record 'would be contrary to the public interest.' SG § 10-618(a). In considering 'the public interest,' the custodian should also take account of the harms specified in SG § 10-618(f)(2). See Attorney General's Office, Public Information Act Manual 28 (4th ed. 1985). In particular,

the custodian should consider whether the information on the recording is such that disclosure would 'constitute an unwarranted invasion of personal privacy.'

F. Court-Ordered Nondisclosure

Finally, the PIA provides for temporary denial of inspection of any public record when 'the official custodian believes that inspection would cause substantial injury to the public interest.' SG § 10-619(a). The official custodian must petition the circuit court for an order permitting continued nondisclosure within 10 days of the original denial under this section. The person who sought access to the record must be notified of that action and has the right to appear and be heard in the court's proceeding on the petition.

The governmental entity in such a proceeding bears the burden of proving that disclosure would do substantial injury to the public interest. Cranford v. Montgomery County, 300 Md. 759, 780 (1984). Moreover, meeting that burden of proof may be difficult, for the PIA generally 'shall be construed in favor of permitting inspection of a public record.' SG § 10-612(b). This 'extraordinary' procedure is very rarely invoked. See Public Information Manual at 35.

IV

Conclusion

In summary, it is our opinion that:

1. Recordings of calls to 911 Emergency Telephone System centers are 'public records' under the PIA.
2. The portion of any recording that contains medical or psychological information about an individual may not be disclosed.
3. Recordings of calls for police assistance may be withheld from disclosure, but only if disclosure would be contrary to the public interest.
4. All other recordings must be disclosed upon request, except in the extraordinary situation in which a court is asked to withhold otherwise available information.

Very truly yours,

*6 Stephen H. Sachs

Attorney General

Emory A. Plitt, Jr.

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Chief Counsel Opinions and Advice

Footnotes

- 1 See also Part III D 2 below, which discusses the possible nondisclosure of 'sociological information.'
- 2 This opinion confirms the substance of a prior advice letter on this issue. Letter from Dennis M. Sweeney, Deputy Attorney General, to Russell E. Wroten, Chief of Police of Cambridge, Maryland (June 26, 1984).
- 3 The General Assembly 'recognize[d] that [emergency] assistance is almost always summoned by telephone and that a multiplicity of emergency telephone numbers exist[ed] throughout the State and within any one county' and expressed its 'concer[n] that avoidable delays in reaching appropriate emergency aid [were] occurring to the jeopardy of life and property.' Article 41, § 204H-1(b) and (c).

- 4 As it happens, Maryland was preceded by our good neighbor Delaware—which has, of course, historically prided itself on being the ‘first state.’
- 5 The taping of such emergency telephone calls is lawful, notwithstanding the general prohibition against wiretapping, under § 10-402(c)(4) of the Courts Article.
- 6 The ‘custodian’ of a public record is the governmental officer or employee who is responsible for keeping the public record or who actually has physical custody and control of the record. SG § 10-611(c). Because the Emergency Number Systems Board does not itself operate any 911 system nor receive physical custody of any of the local systems’ tapes, it is not the custodian of those tapes. Therefore, any request for access to those tapes must be directed to the local government officials or employees who operate the 911 systems in the various political subdivisions.
- 7 The ‘person in interest’ with regard to a public record is any person who is the subject of the records, or that person’s designee or legal representative. SG § 10-611(e).
- 8 Article 27, § 739 prohibits disclosure or review of expunged police records pertaining to a criminal proceeding. However, those records by definition do not include ‘investigatory files [or] police work-product records used solely for police investigation purposes.’ Article 27, § 735(e). That exclusion clearly encompasses records of calls for police assistance.
- 9 We direct your attention also to SG § 10-614(b)(3), under which an applicant must be given prompt written notice of the reasons and authority for any denial of a disclosure request and of the procedures for review of the denial that are available to the applicant.
- 10 As originally enacted, the FOIA exception authorized nondisclosure of ‘investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.’ See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221-22 (1978). It now authorizes nondisclosure of ‘investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would’ harm specified governmental interests. 5 U.S.C. § 552(b)(7). Under the FOIA, the term ‘investigatory records’ is narrower than ‘investigatory files.’ See 437 U.S. at 229-30.

71 Md. Op. Atty. Gen. 288 (Md.A.G.), 1986 WL 287625

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SB535 Rouse Opinion - Testimony Sen. Kagan

Uploaded by: Senator Kagan, Senator Kagan

Position: FAV

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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

SB535: 9-1-1 Communications - Denial of Part of a Public Record
Education, Health, and Environmental Affairs Committee
Thursday, February 13, 2020, 1:00pm

In 2018, the Next Generation 9-1-1 (NG911) Commission was established to facilitate the transition to NG911 statewide. The first year's recommendations were drafted into three bills that passed the General Assembly and were signed by the Governor. Among the issues addressed in "Carl Henn's Law" were modifying the funding structure; updating our technology; acknowledging cybersecurity threats; addressing our recruiting and retention challenges; and adding more oversight and accountability. The other new laws improved benefits for 9-1-1 Specialists and offered some privacy for crime victims. The Commission included MPIA reform in its original recommendations, resulting in the SB5 (2019), which is now law. Despite last year's success, there is still more work to protect people who call 9-1-1 for help.

The NG911 Commission I chair continues to be concerned about protecting the personal information of 9-1-1 victims. In 2019, the Commission voted unanimously to include updates to the Maryland Public Information Act (MPIA) among its 25 recommendations for the 2020 legislative session.

Transparency is vital to ensure accountability, but it is also important to consider the privacy of those who contact 9-1-1. The MPIA is a crucial tool to allow citizens to see the workings of their government. It is not, however, designed to allow us to see into our neighbors' houses in their time of crisis.

SB535 would simply codify the Attorney General's *Rouse* opinion of 1986 in order to protect callers from having their personal information shared with the public. This opinion noted:

- Recordings of calls to 9-1-1 centers are 'public records' under the MPIA.
- The portion of any recording that contains medical or psychological information about an individual may not be disclosed.
- Calls for police assistance may be withheld if it would be contrary to the public interest.

This bill would modernize the MPIA to prepare for changes coming with NG911. In addition to the current ability to communicate through a phone call, NG911 will allow people in distress to send:

- Text messages requesting assistance;
- Photos of the emergency; and
- Videos of the event to the 9-1-1 Specialist.

These advanced capabilities will certainly lead to new privacy violations that the State **must** address before people's lives are irreparably damaged.

I urge a favorable report on SB535.

ACLU_Holness_UNF_SB0535

Uploaded by: Holness, Toni

Position: UNF



**Testimony for the Senate Education, Health, and Environmental
Affairs Committee**

February 13, 2020

**SB 535 Public Information Act - Denial of Part of a Public Record -
Victims and Witnesses**

TONI HOLNESS
PUBLIC POLICY DIRECTOR

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PRESIDENT

The ACLU of Maryland respectfully urges an unfavorable vote on SB 535, which defines “contrary to the public interest” to include a situation in which a custodian reasonably believes that inspection of a part of a public record would reveal the identity of a victim or witness of domestically-related crimes, other than an active law enforcement officer. The bill also adds witnesses to the list of persons who custodians shall contact prior to disclosing a record.

SB 535 is unnecessary because current PIA provisions already give custodians discretion to deny information requests that would disclose a witness’s identity.

The PIA grants custodians broad discretion to withhold documents during the pendency of an investigation.¹ After the investigation is complete, custodians may still withhold documents if disclosure would meet any of the following criteria²:

1. Interfere with a valid and proper law enforcement proceeding;
2. Deprive another person of a right to a fair trial or an impartial adjudication;
3. Constitute an unwarranted invasion of personal privacy;
4. Disclose the identity of a confidential source;
5. Disclose an investigative technique or procedure;
6. Prejudice an investigation; or
7. Endanger the life or physical safety of an individual.

Therefore, when requests are made for material that may disclose witness information that meets any of the above criteria, custodians have full license to withhold that material.

There have been no reported incidents of witness information being improperly disclosed in Maryland.

¹ Md. Code, Gen Prov. §§ 4-343, 4-351(a)(1).

² Md. Code, Gen Prov. §§ 4-351(b).



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Maryland

We are aware of no incident in the state of Maryland wherein witness information was improperly released by a state agency. In fact, based on the ACLU of Maryland's experience having filed many requests for records, there is no evidence to suggest that state agencies err on the side of disclosure. In our experience, the exemptions under the PIA are more frequently used by agencies to shield documents from disclosure and even hide governmental misconduct than to invade Marylanders' privacy.

SB 535 is unworkable because there could be any number of witnesses to a particular crime.

SB 535 would require custodians to contact an undefined universe of persons who may be witnesses to domestically-related offenses before disclosing material in response to a records request. Virtually any material in the possession of the government *could* include information about a witness to a crime—from video footage of the outside of a courthouse to body-worn camera video footage.

SB 535 references crimes that should be struck from the Criminal Law Article.

SB 535 includes witnesses to crimes listed in Title 2 of the Criminal Law Article, which include sodomy. While there is another bill being introduced to strike that reference from the law, we would be concerned about passing SB 535 prior to that bill's passage.

In 2019, the General Assembly passed into law the victim notification provision.

During the 2019 legislative session, the ACLU of Maryland worked with the proponents of this legislation to reach a compromise to require notification to victims who may be identified in a records disclosure. That law went into effect on October 1, 2019. We would urge this body to learn more about the implementation of that law before further amending it.

For the foregoing reasons, the ACLU of Maryland respectfully urges an unfavorable report on SB 535.